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No. —

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**In the Supreme Court of the United States**

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JOHN KEHOE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
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The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in this case on June 27, 1939.

**OPINIONS BELOW**

The opinion of the Board of Tax Appeals (R. 33-35) is reported in 34 B. T. A. 50. The majority and dissenting opinions in the Circuit Court of Appeals (R. 493-502 are reported in 105 F. (2d) 552.

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered June 27, 1939 (R. 502-503). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether the Circuit Court of Appeals for the Third Circuit departed from the accepted and usual course of judicial proceeding in upsetting the finding of the Board of Tax Appeals that there was fraud, malfeasance, and misrepresentation of facts by the taxpayer in entering into a closing agreement, and that such fraud, malfeasance, and misrepresentation of facts materially affected the determination of the taxpayer's income-tax liability for 1925, covered by the agreement.

**STATUTE INVOLVED**

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1003. (a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require (U. S. C., Title 26, Sec. 641).



SEC. 1106. (b) after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

#### STATEMENT

The facts as found by the Board of Tax Appeals (R. 33-35) and as disclosed by the record are as follows:

During the year 1925 the taxpayer, John Kehoe, illegally operated a brewery, known as Bartel's Brewery or McGowan's Brewery, at Edwardsville, Pennsylvania, through a permit obtained by P. F. McGowan to manufacture cereal beverages under the National Prohibition Act (R. 36-40, 90, 196). The brewery manufactured legal "near beer," which was sold locally, and illegal beer, which was

shipped by rail from Kingston, Pennsylvania (R. 38, 43, 143-144, 292-304, 335-336, 357-367, 368-370; Exhibits FFF, GGG, HHH). Approximately 885 cars of illegal beer were shipped in 1925 (a carload consisting of about 100 barrels), and sold at from \$12 to \$17 a barrel (R. 43; Exhibits FFF, GGG, HHH). Based on the minimum price, the total income derived from the illegal sales was at least \$890,000 (R. 43, 50). The brewery operated until February 28, 1927. (R. 149, 173, 262).

McGowan was employed by the taxpayer to secure the original permit for the brewery in 1924; he was thereafter paid a salary of \$200 a month by the taxpayer, and was sometimes given extra amounts (R. 36, 40-41). He performed no regular services (R. 40). He signed such leases, applications for permits, and contracts as he was requested to sign by the taxpayer, or by William F. McHugh, manager of the brewery. He was told to "keep his mouth shut" about the brewery and was sometimes sent on trips to get him away from the brewery (R. 36-41, 138-140, 166, 172-173, 255). He opened one bank account with funds provided by Kehoe. Another was opened in his name by someone else, checks being drawn thereon by McHugh (R. 37, 41-42).

The regular books of the brewery, which were kept by Charles J. Locke, did not show charges for freight on illegal beer or sales of such beer (R. 41-42). Records of these transactions were kept



in another set of books in the back office of the brewery (R. 42, 336). Locke prepared income-tax returns for McGowan for 1924, 1925, and 1926, in which he purported to return the income from the brewery (R. 42, 196). The return for 1925 showed a net loss of \$82,325.97 (R. 42). No amounts were included in these returns to reflect the sales of illegal beer (R. 42, 196-197, 335).

The taxpayer reported no income from the brewery or from the sale of any beer in his 1925 income-tax return filed March 15, 1926 (R. 43). This return, which was signed by him and purported to be a joint return of himself and his wife, disclosed a net income of \$19,198.33 and a tax liability of \$194.56 (R. 10, 18-19, 36, 43). It did not state the nature of the taxpayer's business or occupation (Exhibit LLL).<sup>1</sup> His return was prepared by his secretary from data shown by his books (R. 398-401).

After an investigation the Commissioner, on October 20, 1927, sent to the taxpayer and his wife a notice of a deficiency in the amount of \$9,563.86 (R. 43-44). The nature of the additional income of \$53,990.46 on which this deficiency was based is not disclosed by the record (R. 10, 19, 497). This deficiency was assessed and paid November 15,

<sup>1</sup> The exhibits do not appear in the printed record. They were transmitted from the Board of Tax Appeals to the court below by order of the court (R. 6, 490), and are being certified to this Court.

1927 (R. 44). Thereafter an agreement in writing was entered into between the taxpayer and the Commissioner fixing the total liability for tax and interest for the year 1925 at \$10,631.74, which represented the tax originally paid, the deficiency of \$9,563.86, and the interest due (R. 44). This agreement was approved by the Acting Secretary of the Treasury on January 27, 1928 (R. 44).

In June 1929, the Commissioner was informed of the operation of what was known as Bartel's or McGowan's Brewery, and that John Kehoe was the owner of the brewery during 1925 (R. 44, 176-177; Exhibit 1). The informers were McGowan, Paul T. Jones, and George N. Murdock, who in March 1932 filed a claim for a reward for having given the "first information" which led to the detection of John Kehoe for violation of internal revenue laws (R. 176-177, 204, 216-230, 393-395; Exhibit 1). The nature of the information given by the informers is indicated by Exhibit 1.

On January 3, 1930, the Commissioner notified the taxpayer in writing that it was necessary to make a further examination of his income-tax liability for 1925 (R. 44). On February 13, 1932,<sup>2</sup> the Acting Secretary of the Treasury approved a cancellation and revocation of the closing agreement and directed the Commissioner to take such further action to adjust the tax liability for the year

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<sup>2</sup> The Board's finding (R. 44) erroneously gives the date as February 13, 1933.

1925 as might be in order (R. 44; Exhibit DDDDD). On February 24, 1932, the Commissioner mailed a deficiency notice to the taxpayer and his wife, asserting a deficiency of \$208,043.36 and a fraud penalty of \$108,803.61 (R. 15-17, 35, 44). The deficiency was based on income of \$890,000 from the brewery which had not been reported (R. 16-17).

Besides finding these facts the Board in its opinion pointed out that the taxpayer had at all times denied and still denied his connection with the brewery (R. 50). The denials are made in his pleadings before the Board (R. 26-27). The pleadings also show that Kehoe was indicted for income-tax evasion on March 4, 1932, but the indictment was subsequently dismissed because it had not been returned within three years after the commission of the offense charged therein (R. 13, 23-24).

On the basis of the evidence before it, the Board found that the 1925 return was false and fraudulent, with intent to evade the tax; that the deficiency here involved was due to fraud and that there was misrepresentation by the taxpayer of material facts affecting the determination covered by the closing agreement (R. 44, 50-51). It found that Mrs. Kehoe realized no income from the brewery, and was not guilty of fraud affecting the 1925 tax, and determined that the deficiency and fraud

penalty should be assessed against Kehoe alone (R. 45).

The court below held that the Board was warranted in finding that Kehoe illegally operated the brewery, concealing his identity as operator, and that during 1925 he realized income amounting to over \$890,000, but held that the Commissioner had not sustained the burden of proving that the closing agreement was entered into through fraud, malfeasance, or misrepresentation, and reversed the Board (R. 493-498, 503).

#### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the Board's finding that there was fraud, malfeasance and misrepresentation by the taxpayer of material facts affecting the determination of the deficiency covered by the 1927 closing agreement was supported by substantial evidence.
2. In usurping the power of the Board by weighing the evidence and drawing its own inference from the facts and substituting its inference for the Board's ultimate finding of fact.
3. In holding that fraud, malfeasance, and misrepresentation by the taxpayer in the execution of the closing agreement could not be proved except by direct testimony that no income from the brewery was included in the additional income on which the deficiency covered by the closing agreement was based.

4. In holding that because there was no direct testimony as to whether or not any brewery income was included in computing the deficiency on which the 1927 closing agreement was based, the Board was obliged to draw the inference that such income was included and that there was no fraud, malfeasance, or misrepresentation in the closing agreement.

5. In disregarding evidence establishing continuous actual concealment by the taxpayer of his connection with the brewery until after the closing agreement was signed.

6. In disregarding evidence establishing that the Government did not know of Kehoe's connection with the brewery until McGowan's disclosures in 1929.

7. In reversing a finding of fact of the Board where it does not appear that the evidence with every reasonable inference that may be drawn therefrom in the petitioner's favor, is insufficient to sustain it.

8. In reversing the Board's order redetermining a deficiency of \$208,043.36 and a fraud penalty of \$108,803.61.

#### REASONS FOR GRANTING THE WRIT.

This case presents simply a question of fact: Whether there was fraud or malfeasance or misrepresentation of fact affecting the determination of the tax covered by the 1927 closing agreement.



The Board found that there was such fraud, malfeasance, and misrepresentation; the majority of the court below, composed of Judges Davis and Buffington, rejected that finding, Judge Biggs dissenting. With full recognition of the proper reluctance of this Court to grant certiorari to review questions of fact, we nevertheless feel obliged to ask review of the decision below. We believe the decision to be a flagrant miscarriage of justice, and that in its review of the Board's decision the court below has so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's powers of supervision.

Specifically, the court below ignored substantial evidence supporting the Board's findings of fact that there was fraud, malfeasance, and misrepresentation affecting the tax covered by the closing agreement. It usurped the jurisdiction given to the Board by weighing the evidence and substituting its own finding for that of the Board. Section 1003 (b), Revenue Act of 1926, *supra*; *Palmer v. Commissioner*, 302 U. S. 63; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282; *Colorado Bank v. Commissioner*, 305 U. S. 23; *Hulburd v. Commissioner*, 296 U. S. 300; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Helvering v. Rankin*, 295 U. S. 123. Even if upon a complete examination of all material evidence it had found that conflicting inferences might have been drawn, it would have had no power to reverse the Board. *Palmer v. Com-*



*missioner, supra; Elmhurst Cemetery Co. v. Commissioner, supra.*

The court's error is the more serious in this case because the evidence so clearly supports the Board's finding that at the time the closing agreement was entered into the taxpayer concealed from the Bureau of Internal Revenue the fact that he was connected with the brewery. The following constitutes substantial evidence of continuous actual concealment of this fact from the time the return was filed until McGowan's disclosures in 1929 and Kehoe's attempted concealment before the Board:

1. There was concealment at the time the 1925 return was filed (R. 43, 50; Exhibit LLL).

2. The brewery was operated in McGowan's name from February 1924 to February 28, 1927, and he reported income from it in his returns as owner (R. 40, 42, 143, 173, 262).

3. The illegal operations were kept secret (R. 40-42, 166, 172, 208-211, 336).

4. The taxpayer was afraid that his connection with the brewery might become known and paid McGowan to keep silent about his connection with it (R. 40, 139-141, 166, 211).

5. In the latter part of 1926 McGowan was paid \$500 when Kehoe planned to obtain a new permit in the name of John Carroll, and when that plan failed McGowan, in February 1927, was instructed to turn over the beer to the National Prohibition

Department, and did so in his own name (R. 39-40, 173).

6. On the Friday before April 19, 1928, when the court below decided *United States v. Glass*, 25 F. (2d) 941, holding that McGowan, McHugh, and others connected with the brewery could not be removed to the Northern District of Ohio to stand trial on an indictment charging them with conspiracy to violate the National Prohibition Act,<sup>3</sup> McGowan was told by Kehoe that if he was returned to Cleveland he must go to jail but that he would be paid \$60,000 or \$70,000 (R. 166-167, 208-211, 221-222).

7. Kehoe was not indicted with McGowan and McHugh.

8. McGowan's break with Kehoe occurred when Kehoe refused to pay him after the court below handed down its 1928 decision (R. 222), and it was not until June 1929 that he and his associates informed the Government of Kehoe's activities (R. 44, 176-177; Exhibit 1).

9. McGowan and his associates filed a claim for a reward for having given the first information leading to the determination of the deficiency here involved (Exhibit 1).

10. In his reply to the Commissioner's answer in this case, Kehoe still denied all connection with the brewery, and whether or not he was its owner and

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<sup>3</sup> McGowan was indicted and arrested in 1927 but was released on bail (R. 153-156).

operator was one of the principal issues before the Board (R. 26-28, 46-47, 50).

11. The additional income on which the deficiency covered by the closing agreement was based was about \$53,000, whereas the net income derived from illegal operations of the brewery was \$890,000, and McGowan in his 1925 income-tax return had reported a loss on its legal operations (R. 10, 19, 42; 179-180).

The court below apparently disregarded all of this evidence. It assumed that the only manner in which the Commissioner could prove fraud, malfeasance, or misrepresentation was by direct testimony that no income from the brewery was included in computing the deficiency on which the closing agreement was based. It held that since there was no direct testimony on that point the Board could have drawn either the inference that it was included or the inference that it was not included; that the Commissioner had the burden of proof as to fraud and hence that the Board should have decided for the taxpayer.

As Judge Biggs pointed out in his dissenting opinion the evidence did not show that the deficiency on which the closing agreement was based included any income from the brewery, and even if it were disclosed that some of the brewery income was included, there was no showing that the whole or any substantial part of such income was included.

Plainly, in any event, Kehoe must have concealed the receipt of all but \$53,000 of the \$890,000 brewery income. And as Judge Biggs further stated, the fact that the evidence clearly indicated that the United States first received knowledge of Kehoe's connection with the brewery when McGowan turned informer (in 1929) and that Kehoe continuously refused to acknowledge that connection, negatives any assertion that he disclosed his income from this source to the Government in 1927. The disregard of such evidence by the majority of the court, or the assumption that it was not material, appears to be merely a rationalization of the decision, which, in fact, resulted from its weighing the evidence and reaching its own conclusion on the facts.

There was no justification for the court's assumption that fraud, malfeasance, and misrepresentation could be proved in only one way. Fraud can be established by circumstantial evidence (*Mammoth Oil Co. v. United States*, 275 U. S. 13, 36; *Wood v. United States*, 16 Pet. 342; *Castle v. Bullard*, 23 How. 172), and concealment constitutes fraud or misrepresentation when one is under a duty to speak (*Stewart v. Wyoming Rancho Co.*, 128 U. S. 383; *Tyler v. Savage*, 143 U. S. 79, 98). The taxpayer had filed a false and fraudulent return disclosing no income from the brewery. His connection with it and its illegal operations were concealed by many devices, not only from the Government but from the general public. He knew

when the closing agreement was signed that he had realized income from this source and that such income had not been reported in his return. The fact that concealment by the same devices previously employed continued until long after the 1927 closing agreement, that he made payments to McGowan after 1927 to insure his continued silence, and that he denied any connection with the brewery as late as 1934, obviously constitutes persuasive evidence that there was no disclosure in 1927. The weight to be given such evidence was a matter for the Board's determination.

The suggestion in the opinion that the Board's findings in fraud cases do not have the same weight as in other cases is wholly unsupported. It is true that the burden of proof is upon the Commissioner in such cases. But that fact in no way affects the conclusiveness of the Board's findings of fact in such cases, if its findings are supported by substantial evidence. *Helvering v. Nat. Grocery Co.*, *supra*; *Mitchell v. Commissioner*, 89 F. (2d) 873 (C. C. A. 2d), reversed on other grounds, 303 U. S. 391; *Wickham v. Commissioner*, 65 F. (d) 527 (C. C. A. 8th); *Commissioner v. Hales*, 76 F. (2d) 916 (C. C. A. 7th); *Goldberg v. Commissioner*, 100 F. (2d) 601 (C. C. A. 7th), certiorari denied, April 24, 1939; *Schallman and Geller v. Commissioner*, 102 F. (2d) 1013 (C. C. A. 6th). See also *Commissioner v. Ingram*, 87 F. (2d) 915 (C. C. A. 3d).

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

**ROBERT H. JACKSON,**  
*Solicitor General.*

**SEPTEMBER 1939.**



